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No. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

THE STATE OF WASHINGTON,

Cross-Petitioner,

v.

ASSOCIATED GROCERS, INC.,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTION PRESENTED

Can the Washington Supreme Court properly use the Equal Protection Clause of the Fourteenth Amendment to invalidate a tax exemption available to retailers, who make internal distributions, but not to wholesalers, without examining whether there is a rational basis for taxing retailers and wholesalers differently?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	3
STATEMENT	3
I. OPERATION OF WASHINGTON TAX SYSTEM	3
II. OPERATION OF THE TAX IN THIS CASE	4
III. DECISION BELOW	5
REASONS WHY WRIT SHOULD BE GRANTED	7
I. THE STATE SUPREME COURT'S REFUSAL TO EXAMINE THE RATIONALITY OF THE LEGISLATURE'S CLASSIFICATION CONFLICTS WITH THIS COURT'S EQUAL PROTECTION PRECEDENTS	7
II. APPLICATION OF THE WASHINGTON COURT'S INVALID TEST FOR EQUAL PROTECTION VIOLATION RESULTS IN STRIKING DOWN CLASSIFICATIONS THAT WOULD BE UPHELD UNDER PROPER RATIONAL BASIS ANALYSIS	10
CONCLUSION	11
APPENDIX: CONSTITUTIONAL PROVISIONS AND STATE STATUTES	1a

TABLE OF AUTHORITIES

Cases

Page

Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 109 S.Ct. 633 (1989) 9

Amerada Hess v. New Jersey Taxation Division, 109 S. Ct. 1617 (1989) 8

Associated Grocers, Inc. v. State, 114 Wash.2d 182, 787 P.2d 22 (1990) 2,7,10

Brown-Forman Co v. Kentucky, 217 U.S. 563 (1910) 9

City of Dallas v. Stanglin, 109 S.Ct. 1591 (1989) 8

Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988) 8

Labor Board v. International Van Lines, 409 U.S. 48 (1972) 2

McGowan v. Maryland, 366 U.S. 420 (1961) 8

Michigan v. Long, 463 U.S. 1032 (1983) 8

Strunk v. United States, 412 U.S. 434 (1973) 2

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 2

United States v. Sperry Corporation, 110 S. Ct. 387 (1990) 8

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 8,9

Vance v. Bradley, 440 U.S. 93 (1979) 8

Yakima County Deputy Sheriff's Assn. v. Board of Commissioners, 92 Wash.2d 831, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980) 6,7

Page

Constitutional Provisions, Statutes and Regulations

Wash. Rev. Code § 82.04.050 3
Wash. Rev. Code § 82.04.060 3
Wash. Rev. Code § 82.04.250 3
Wash. Rev. Code § 82.04.270 3,5,10,11
Wash. Rev. Code § 82.04.270(1) 3
Wash. Rev. Code § 82.04.270(2) 3,4,5,6
Wash. Laws 1935, c. 140 § 4 3
Wash. Laws 1941, c. 178 § 1 3
Wash. Laws 1955, c. 389 § 47 3
Wash. Laws 1959, Ex. Sess. c. 5 § 3 3
28 U.S.C. § 1257 3

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Cross-petitioner, the State of Washington, respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of Washington. The Washington Supreme Court found that a tax exemption which is available to retailers distributing to their own outlets, but not available to wholesalers, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court made this ruling without examining whether a rational basis exists for the differing treatment. Associated Grocers has filed a petition for writ of certiorari seeking review of the remedial portion of the court's decision, which denied retroactive relief.

Associated Grocers claims that the Washington court's refusal to provide retroactive relief was erroneous. The State of Washington is filing this counter-petition because the Washington Supreme Court's conclusion deny-

ing relief was correct in that the exemption in controversy is not invalid under proper equal protection analysis. Therefore, Associated Grocers is not entitled to a refund or other form of retroactive relief. This cross-petition may also be necessary to preserve arguments the State will make in response to Associated Grocers' petition.[1]

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported as *Associated Grocers, Inc. v. State*, 114 Wash.2d 182, 787 P.2d 22 (1990), and is reproduced as Appendix A to Associated Grocers' petition. The unpublished memorandum opinion of the trial court dated March 19, 1988, is reproduced as Appendix B to Associated Grocers' petition. The unpublished trial court order holding part of the Washington business and occupation tax unconstitutional is reproduced as Appendix C to Associated Grocers' petition. The trial court's unpublished order granting Associated Grocers a refund of tax is reproduced as Appendix D to Associated Grocers' petition. The Washington Supreme Court's unpublished order denying both parties' motions for reconsideration is reproduced as Appendix E to Associated Grocers' petition.

JURISDICTION

The Washington Supreme Court's opinion in the case was entered on March 1, 1990. Timely motions for reconsideration by the State of Washington and Associated Grocers were both denied on May 17, 1990. Associated Grocers filed a petition for writ of certiorari to the Supreme Court of the State of Washington which was received by the State of Washington on August 16, 1990. The State of Washington is bringing a cross-petition for a writ of certiorari under Rule 12.3. The Court has jurisdiction to review the

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[1]*See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-27 n.2 (1975); *Strunk v. United States*, 412 U.S. 434 (1973); *Labor Board v. International Van Lines*, 409 U.S. 48, 52 n.4 (1972).

Washington State Supreme Court's opinion by writ of certiorari under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Wash. Rev. Code §§ 82.04.050, 82.04.060, 82.04.250, and 82.04.270 are set forth in the Appendix to the State of Washington's cross-petition for writ of certiorari.

STATEMENT

I. OPERATION OF WASHINGTON TAX SYSTEM.

Washington imposes business and occupation (B&O) tax on the activities of making wholesale or retail sales. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. A wholesale sale is a sale for resale either to another wholesaler or a retailer. Wash. Rev. Code § 82.04.060. On the other hand, a retail sale is a sale to a consumer. That is, a sale that is not for resale. Wash. Rev. Code § 82.04.050.

Both the wholesale and retail B&O taxes are measured by the gross proceeds of sales. The basic rate of both taxes is .0044. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. Thus, the wholesale B&O tax on a sale of $1,000 is $4.40 ($1,000 x .0044). The B&O tax on a retail sale of $1,000 would also be $4.40.

At various times, including the present,[2] Washington has imposed an additional B&O tax on retailers, with two or more retail outlets, who make internal distributions. Wash. Rev. Code § 82.04.270(2). An internal distribution is

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[2]A tax on retailers distributing to two or more of their own retail outlets was first passed in 1935. Wash. Laws 1935, c. 140 § 4. In 1941 the tax was removed and retailers were not subject to the additional tax on distribution until 1955. Wash. Laws 1941, c. 178 § 1. A tax on retailer distribution was passed again in 1955. Wash. Laws 1955, c. 389 § 47. Within four years, in 1959, the Legislature modified the tax to relieve retailers of this additional distribution tax if they purchased the goods from a wholesaler who had already paid wholesale tax on the items. This version of the statute is still in effect. Wash. Laws 1959, Ex. Sess. c. 5 § 3.

not a sale. It occurs when a retail business distributes merchandise from its own warehouse to one of its retail outlets. The measure of this additional tax is the value of the articles distributed. The basic rate is .0044. *Id.* Thus, if a retailer distributes goods valued at $1,000 from a warehouse to its retail outlet, the additional internal distribution tax is $4.40. This tax is imposed on top of the retail B&O tax of $4.40 that the business pays when it sells the goods for $1,000. Thus, the total tax on the retailer for the $1,000 of goods—distributed and sold—is $8.80.

Washington relieves the retailer of the additional tax on internal distributions if the retailer purchases property from a wholesaler who has paid the wholesale B&O tax. Wash. Rev. Code § 82.04.270(2). However, this exemption does not apply to the tax imposed on the retail sale. The retailer is always subject to the B&O tax on a retail sale of the goods.

Wholesalers are not subject to the tax on internal distributions, nor are they given the previously described exemption that relieves the tax on some internal distributions. Just as the retail seller is always subject to retail B&O tax, the wholesale seller is always subject to tax on its wholesale sales. As with the retail seller, the wholesale seller is not relieved of its wholesale B&O tax obligations simply because it has purchased goods from another wholesaler who has paid wholesale B&O tax.

II. OPERATION OF THE TAX IN THIS CASE.

Associated Grocers brought this action for refund of B&O taxes in 1985 after having paid under this tax structure without challenge since its adoption in 1959. Associated Grocers is exclusively a wholesaler of grocery products taxable on its wholesale sales. Its customers are independent retail grocery stores. Associated Grocers is not subject to any additional tax on internal distributions.

Safeway, a large chain grocery store operation, is not a party to this case, although it did appear as *amicus curiae* before the Washington State Supreme Court. Safeway

has been used as an example of a retailer engaged in internal distribution in the grocery industry. Contrary to the assertion by Associated Grocers, internal distributors, like Safeway, are not in competition with wholesalers. They do not solicit retail customers or make wholesale sales. They simply distribute merchandise to their own stores. Competition does exist between retailers engaged in internal distribution and retail customers of wholesalers. The retail customers of Associated Grocers are not parties to this litigation.

Associated Grocers brought the present suit for a refund of wholesaling B&O taxes paid since January 1, 1981, arguing that the exemption in Wash. Rev. Code § 82.04.270(2) relieving retailers from the tax on internal distribution was discriminatory. Associated Grocers wanted the exemption to apply to wholesalers purchasing items from other wholesalers who had already paid a wholesale tax on the merchandise even though they were not subject to a tax on internal distribution. Under such a tax structure Associated Grocers, as a wholesaler, would pay no B&O tax at all on items to which the exemption applied. Retailers, like Safeway, on the other hand, would still be liable for the retail B&O tax even if they were relieved from the additional tax on internal distributions. The amount of tax in controversy for Associated Grocers alone is in excess of $9 million.

III. DECISION BELOW.

At both the trial court and the State Supreme Court level the parties agreed that Wash. Rev. Code § 82.04.270 was an economic regulation and therefore properly subject to minimal scrutiny equal protection analysis. Associated Grocers argued that equal protection was denied because members of an alleged single taxpayer class were treated differently. The State argued throughout that the pertinent inquiry was whether a rational basis existed for the differing treatment of retailers performing internal distri-

bution and wholesalers.[3] The majority opinion of the Washington Supreme Court adopts the position of Associated Grocers and finds a violation of equal protection merely because members of what it concludes was one taxpayer class were treated differently.

The Washington Supreme Court invalidated the exemption extended to internal distributors under RCW 82.04.270(2) without ever engaging in any analysis of whether or not there was a rational basis for the Legislature's differing treatment of wholesalers and retailers. The court rejected rationality review and substituted one prong of a three-part test that did not require examination of the legislative purpose:

> Using this test the court makes three inquiries: (1) whether the classification applies alike to all members within the designated class; (2) whether some basis in reality exists for reasonably distinguishing between those within and without the class; and, (3) whether the challenged classification bears any rational relation to the purposes of the challenged statute. *Yakima County Deputy Sheriff's Assn. v. Board of Commissioners*, 92 Wash.2d 831, 835-836, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980).

The court used the first prong of this test to invalidate the legislative action at issue in the case. The court summarily concluded that the Legislature created a single class of taxpayers and then treated them differently. This ended the court's inquiry into the legitimacy of the legisla-

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[3]The State objected to analysis which stopped with the mere conclusion that a single class existed rather than examining the rationality of the differing treatment provided under the statute:

> Such an approach avoids any meaningful analysis of the legislative classification inescapably presented by the statute. The real issue for resolution is not whether the legislature created two classes, clearly they did. One class is taxed on all wholesale sales, the other is not taxed if the exemption applies. The real legal issue presented is whether or not treating wholesalers and retailers performing wholesale functions differently was based on actual differences between them and was reasonably related to a legitimate legislative purpose.

(Brief of Appellant p. 12).

tive classification. The court specifically refused to engage in any further analysis which would examine the rationality of the differing treatment stating:

> Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional. It is not necessary to consider the second and third inquiries under the *Yakima County* test.

Associated Grocers, 114 Wash.2d at 188, 787 P.2d at 25 (Pet. 6a).

The dissenting opinion rejected this single class characterization of the statute stating:

> This conclusion stems from the majority's erroneous assumption that the Legislature intended to treat distributors and wholesalers under the statute as members of the same taxpaying class.

Associated Grocers, 114 Wash.2d at 192, 787 P.2d at 27 (Pet. 10a). The dissent then went on to analyze the rationality of the differing treatment afforded wholesalers and retailers. It found that extending the exemption only to retailers was a rational attempt to address a particular aspect of competition at the retail level.[4] The majority opinion failed to engage in this rational basis inquiry so necessary to proper equal protection analysis.

REASONS WHY WRIT SHOULD BE GRANTED

I. THE STATE SUPREME COURT'S REFUSAL TO EXAMINE THE RATIONALITY OF THE LEGISLATURE'S CLASSIFICATION CONFLICTS WITH THIS COURT'S EQUAL PROTECTION PRECEDENTS.

The Washington Supreme Court's approach to equal protection is contrary to this Court's precedents because it

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[4]Even the dissenting opinion purports to apply the three-part test of *Yakima County*. The dissent ultimately reached the proper rationality issue by moving to the third inquiry under the test. While its result in this case is more appropriate, the defective approach is still fraught with uncertainty and potential for incorrect results.

fails to require examination of the rationality of differing treatment. This Court has identified mere rationality as the proper inquiry in economic regulation cases. The Washington court's three-part test is a marked departure from this controlling Fourteenth Amendment authority.[5]

The decisions of this Court in economic regulation cases have turned on whether there was a rational basis for a legislative classification. This Court has not used a three-part test and has consistently focused on the existence of any conceivable rational basis for differing treatment under a challenged statute. *United States v. Sperry Corp.*, 110 S. Ct. 387 (1990); *Amerada Hess v. New Jersey Taxation Division*, 109 S. Ct. 1617 (1989); *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *McGowan v. Maryland*, 366 U.S. 420 (1961).

This Court's test for any legitimate rational basis under minimal scrutiny equal protection analysis gives great deference to legislative decisions in the economic arena. This Court's cases acknowledge that any conceivable purpose can be used to uphold a legislative classification. "[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

This Court has also established that if a rational basis for legislative action exists it need not have been the basis which actually motivated the legislature. In *United States Railroad Retirement Board v. Fritz*, this Court stated:

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[5]There is no evidence or claim that the Washington court was deciding the case on independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). The petition of Associated Grocers also frames the question in terms of the Fourteenth Amendment to the United States Constitution.

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," Flemming v. Nestor, 363 U.S. at 612, because this court has never insisted that a legislative body articulate its reasons for enacting a statute.

449 U.S. at 179.

The Washington Supreme Court's "single class" method for analyzing equal protection issues conflicts with these Supreme Court rulings. By focusing solely on the conclusion that a single taxpaying class was created, even though separate taxes were assessed against two types of businesses, the court fails to give any consideration to the proper rationality inquiry mandated by these cases.[6]

The Washington Supreme Court's test of whether the classification applies alike to all members within the designated class is invalid because every statute necessarily applies equally to all to whom it applies. Such an inquiry is trivial and empty of content and is wholly improper when used to strike down a piece of legislation. This Washington test should not be allowed as an alternate form of equal protection analysis because it has no standards for its application and provides no guidance or predictability to the legislature or litigants.

The State of Washington's position that the equal protection test used by the Washington State Supreme Court is erroneous is not simply an exercise in semantics. A test

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[6]Petitioners, Associated Grocers, point to *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 109 S.Ct. 633 (1989) as support for a "single class" analysis for equal protection inquiry. This reference is misplaced. The decision recognized the state's broad power to make different tax classifications "if the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy * * *" *Allegheny*, 109 S.Ct. at 638 (citing *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910)). The statutory framework at issue classified the taxpayers in question the same. No differing statutory treatment existed. The county assessor, however, was applying the statute differently to separate taxpayers. The Court specifically refused to consider the validity of separate treatment under a statutory enactment since it was not present in the case. The current case does not involve an "as applied" challenge to the Washington tax, but a facial finding of invalidity.

which strikes down a legislative action without examining its rationality not only improperly diverts attention from the true inquiry but also results in decisions striking down enactments that would be upheld under proper application of this Court's precedents.

II. APPLICATION OF THE WASHINGTON COURT'S INVALID TEST FOR EQUAL PROTECTION VIOLATION RESULTS IN STRIKING DOWN CLASSIFICATIONS THAT WOULD BE UPHELD UNDER PROPER RATIONAL BASIS ANALYSIS.

The decisions of this Court have consistently upheld legislation if it is not inconsistent with any conceivable legitimate legislative purpose. This very deferential standard of review applied in the area of economic regulation acknowledges a broad range of appropriate legislative discretion in taxation issues. The Washington court's single inquiry into whether a classification applies alike to all members within the designated class fails to provide this deference to legislative authority. The very real danger in using the Washington test is that it can invalidate classifications that would be upheld under required rational basis analysis. The case in controversy is a good example of this problem. Without the benefit of any meaningful analysis the Washington Supreme Court concluded that a single taxpayer classification was created by the statutory enactment of Wash. Rev. Code § 82.04.270 and that since members of the class were taxed differently the statute was therefore unconstitutional.[7]

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[7]Interestingly, in the single paragraph addressing legislative intent the court noted that the language of the statute "expresses an intent to assure that the tax is identical for both *subclasses within the class*." (Emphasis supplied). *Associated Grocers*, 114 Wash. 2d at 187, 787 P.2d at 25 (Pet. 6a). Even in applying its own summary test regarding the makeup of a class the court recognized that two groups were created which it referred to as "subclasses." When two groups are treated differently, the proper equal protection inquiry is whether there is a rational basis for such differing treatment.

The dissenting opinion in *Associated Grocers* did properly engage in a rational basis analysis. The dissent concluded that a rational basis does exist for the differing treatment of retailers and wholesalers under Wash. Rev. Code § 82.04.270. The dissent found that the Legislature was implementing a legitimate legislative purpose to address a particular aspect of competition at the retail level. Under this Court's controlling precedents a legitimate purpose for the enactment is all that is required for its constitutional validity. By failing to engage in this type of inquiry the majority of the Washington State Supreme Court reached the wrong result. In this case it invalidated a statute that taxes retailers and wholesalers differently even though a rational basis existed for the different treatment. Because the majority's "single class" test can, and did, reach a result contrary to rational basis analysis, it should not be allowed to stand.

CONCLUSION

The Washington State Supreme Court ruled that an exemption provided to retailers distributing to their own outlets and not to wholesalers violated the Equal Protection Clause of the United States Constitution. Its decision did not provide retroactive relief for Associated Grocers. Associated Grocers has therefore filed a petition for writ of certiorari seeking revision of this remedial ruling. The State of Washington contends that the Washington court's failure to provide retroactive relief was appropriate because the statutory exemption was constitutional. The State has filed a cross-petition for writ of certiorari in support of this position asking this Court to invalidate the three-part test used by the Washington State Supreme Court for determining an equal protection violation and to overturn its equal protection holding.

The Washington court's test of whether the classification applies alike to all members within the designated class is in conflict with the controlling equal protection analysis identified in this Court's decisions. It is seriously

flawed by its failure to address the rationality of legislative classifications. It is devoid of substantive constitutional meaning and results in striking down classifications that should properly be upheld.

Accordingly, the State has petitioned this Court for a writ of certiorari. Because the Washington court's decision so clearly deviates from accepted equal protection jurisprudence, the Court may wish to consider summary disposition of the matter.

DATED this 14th day of September, 1990.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Revised Code of Washington:

82.04.050 (1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale, or (d) purchases for the purpose of

consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon, or (e) purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065. The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a), (b), (c), (d), or (e) above following such use. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsections (2) and (7) and RCW 82.04.290.

(2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of coin operated laundry facilities when such facilities are situated in an apartment house, hotel, motel, rooming house, trailer camp or tourist camp for the exclusive use of the tenants thereof, and also excluding sales of laundry service to members by nonprofit associations composed exclusively of nonprofit hospitals, and excluding services rendered in respect to live animals, birds and insects; (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the mov-

ing of earth excepting the mere leveling of land used in commercial farming or agriculture; (c) the charge for labor and services rendered in respect to constructing, repairing, or improving any structure upon, above, or under any real property owned by an owner who conveys the property by title, possession, or any other means to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then reconveyed by title, possession, or any other means to the original owner; (d) the sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting; (e) the sale of or charge made for labor and services rendered in respect to automobile towing and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16 RCW; (f) the sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same; (g) the sale of or charge made for tangible personal property, labor and services to persons taxable under (a), (b), (c), (d), (e), and (f) above when such sales or charges are for property, labor and services which are used or consumed in whole or in part by such persons in the

performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this paragraph shall be construed to modify the first paragraph of this section and nothing contained in the first paragraph of this section shall be construed to modify this paragraph.

(3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal business or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) Amusement and recreation businesses including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows and others; (b) abstract, title insurance and escrow businesses; (c) credit bureau businesses; (d) automobile parking and storage garage businesses.

(4) The term shall also include the renting or leasing of tangible personal property to consumers.

(5) The term shall also include the providing of telephone service, as defined in RCW 82.04.065, to consumers.

(6) The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind. The term shall also not include sales of feed, seed, seedlings, fertilizer, and spray materials to persons who participate in the federal conservation reserve program or its successor administered by the United States department of agriculture, or to persons for the purpose of producing for sale any agricultural product whatsoever, including plantation Christmas trees and milk, eggs, wool, fur, meat, honey, or other

substances obtained from animals, birds, or insects but only when such production and subsequent sale are exempt from tax under RCW 82.04.330, nor shall it include sales of chemical sprays or washes to persons for the purpose of post-harvest treatment of fruit for the prevention of scald, fungus, mold, or decay.

(7) The term shall not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the united States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Nor shall the term include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority.

82.04.060 "Sale at wholesale" or "wholesale sale" means any sale of tangible personal property, or any sale of telephone service as defined in RCW 82.04.065, which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: *Provided*, That the term "real or personal property" as used in this section shall not include any natural products named in RCW 82.04.100.

82.04.250 Upon every person except persons taxable under RCW 82.04.260(8) engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

82.04.270 (1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engag-

ing within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided*, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article so distributed as of the time of such distribution: *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: *Provided further*, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.